IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

APL No. 160 OF 2019 &

IA No. 694 OF 2019

Dated: 21st November, 2024

Present: Hon'ble Mr. Justice Ramesh Ranganathan, Chairperson
Hon'ble Smt. Seema Gupta, Technical Member (Electricity)

In the matter of:

M/S MALANA POWER COMPANY LIMITED
Through its Managing Director,
Bhilwara Towers, A-12,
Sector -I, Noida - 201301 … Appellant No.1

VERSUS

1. **HIMACHAL PRADESH STATE ELECTRICITY BOARD LIMITED**
Through its Chief Engineer-Commercial,
Vidyut Bhawan,
Shimla – 171004 ... Respondent No.1

2. **HIMACHAL PRADESH POWER TRANSMISSION COMPANY LIMITED**
Through its Managing Director,
Himfed Bhawan,
Panjari, Shimla-171005 ... Respondent No.2

3. **HIMACHAL PRADESH STATE LOAD DISPATCH CENTRE**
Through its Chief Engineer (SLDC)
Totu, Shimla – 171011 ... Respondent No.3

4. **HIMACHAL PRADESH ELECTRICITY REGULATORY COMMISSION**
Through its Secretary,
Regulatory Commission,
Kusmpati, Shimla – 171009 ... Respondent No.4

Counsel on record for the Appellant(s) : Seema Jain for App. 1

Counsel on record for the Respondent(s) : Anand K. Ganesan
Swapna Seshadri

Ritu Apurva for Res. 1

Pradeep Misra for Res. 4

JUDGMENT

(PER HON'BLE MRS. SEEMA GUPTA, TECHNICAL MEMBER)

1. This appeal is preferred by the Appellant – Malana Power Company Ltd challenging the order dated 30.03.2019 passed by the Himachal Pradesh Electricity Regulation Commission in Petition No. 16 of 2018, in determining wheeling charges and losses payable by the Appellant for the use of the system of Respondent No.1-Himachal Pradesh State Electricity Board Limited.

2. The facts of the case, in brief, are as under:

The Appellant, M/s Malana Power Company Ltd (for short referred as **"Malana"**) is a company engaged in the business of generation and supply of electricity. In this connection, the Appellant has constructed a Hydro Electric Power Project with Pondage with an installed capacity of 86 MW (2X43MW) on Malana Nallah, a glacier fed tributary of Parbati River in District Kullu, Himachal Pradesh.

3. Respondent No.1 is the Himachal Pradesh State Electricity Board Limited (for short referred to as **"HPSEBL"**); Respondent No.2 is the Himachal Pradesh Power Transmission Company Limited (for short referred to as **"HPPTCL"**); Respondent No.3 is the Himachal Pradesh State Load Dispatch Centre (for short referred to as **"SLDC"**) and Respondent No.4 is the Himachal Pradesh Electricity Regulatory Commission (for short referred to as **"HPERC/State Commission").**

4. On 28.08.1993, the Appellant had entered into a Memorandum of Understanding (MOU) with the Government of Himachal Pradesh (GoHP), whereby the Appellant agreed to make available 12% of the net power

generated from its Hydro Power Project at free of cost to the State of Himachal Pradesh or its Agent, and further, that the Himachal State Utility would have the first option to purchase the whole or part of the remaining power generated from the said project at the rates to be mutually agreed upon and/or in accordance with the guidelines of the Central Government.

5. On 13.03.1997, the Appellant entered into an Implementation Agreement with GoHP for implementation and operation of the said 86 MW Malana Hydro Power Project of the Appellant. The Appellant and the erstwhile Himachal Pradesh State Electricity Board, (hereinafter referred to as the **HPSEB**) the predecessor in interest of the Respondents 1 to 3 herein, have entered into an Agreement dated 03.03.1999, wherein the modalities for free power, evacuation of remaining power wheeling charges and other miscellaneous aspects were agreed upon.

6. In accordance with the provisions of the Agreement dated 03.03.1999, the Appellant is to connect its Malana Hydro Power Project to the Himachal Pradesh's State grid of HPSEB at the 132 kV Bajaura sub-station in District Kullu, near to the Power Station (interconnection injection point) for conveyance of the electricity to the interconnecting delivery point sub-station of Power Grid Corporation of India Ltd. (**"POWERGRID")** at Nalagarh, also in the State of Himachal Pradesh for transmission of electricity outside the State by using the inter-state Transmission System of POWERGRID. The Agreement dated 03.03.1999 is for a period of 40 years, from the Commercial Operation of the Date (COD) of the Malana Hydro Power Project and specifies the payment of wheeling charges by the Appellant for transmission of electricity from the injection point to the delivery point, as mentioned above, to the Himachal Pradesh Board for the entire duration of 40 years.

7. The Appellant commissioned its Hydro Project on 05.07.2001 and in compliance with the terms of the agreement reached with the GoHP

and HPSEB of providing free power. As per the said agreement, the Appellant was entitled to supply the remaining quantum of available power to end users outside the State of Himachal Pradesh and for that purpose the Appellant has to wheel the electricity through the State Network. Accordingly, the Appellant has been conveying electricity through the 132 kV Bajaura Sub Station in District Kullu near the Hydro Power Project to the inter connecting point at the Sub Station of POWERGRID at Nalagarh and thereafter through the lines operated and maintained by POWERGRID. For this purpose, Appellant has been applying for and taking the Short Term Open Access to the above system of POWERGRID.

8. In the year 2010, HPSEB was re-organised under the provisions of the Electricity Act, 2003 and the assets and functions of HPSEB came to be vested in Respondent Nos. 1 and 2. Thereafter, the Respondent No. 1, HPSEBL began to undertake generation and distribution of electricity in the State of Himachal Pradesh, which were till such re-organisation of HPSEB were being undertaken by HPSEB. However, the functions of transmission and Load Despatch, which were being undertaken by HPSEB came to be vested in Respondent No. 2. In terms of the said reorganization and vesting of assets, the 132 kV and 66 kV line and substation network in the State of Himachal Pradesh came to be vested in Respondent No. 1, though as per the Appellant, the same should have been vested in Respondent No. 2, since the 132 KV and 66 kV system is generally a part of Extra High Voltage Line and an integral part of the transmission system. After the re-organisation of HPSEB, the position which existed since the commissioning of the Project in the year 2001 and injection of electricity from the generating station and the conveyance of electricity outside the State through the 132 KV Line from Bajaura substation to Nalagarh substation of POWERGRID as stated above continued.

9. During the time, when the HPSEB was functioning as an integrated utility till its reorganization in the year 2010, the transmission charges/wheeling charges with regard to the conveyance of power from Bajaura substation to Nalagarh substation were being determined in terms of the Agreement dated 03.03.1999, namely, 6 Paise/kWh, considering the commercial operation of the Hydro Power Project being before 30.09.2002. The same position was continued even after the re-organization of HPSEB. Even after the constitution of the Himachal Pradesh Electricity Regulatory Commission, Respondent No. 4, the charges for the conveyance of power generated at the Appellant's Generating Station to Nalagarh substation of POWERGRID through the State network continued as before and were recovered in terms of the Agreement dated 03.03.1999. As per the Appellant, the transmission of electricity, generated at the project of the Appellant, through 132 KV Transmission Line to Nalagarh Interconnecting Point of POWERGRID is incidental to the Inter State Transmission of electricity, and as per Section 2 (36) of the Electricity Act, 2003, the same was required to be considered as an Inter State Transmission of electricity and not an Intra State Transmission of Electricity ; the Unscheduled Interchange Charges or the Deviation Settlement Charges in regard to the declaration of availability and scheduling and dispatch of electricity from the Hydro Power Station of the Appellant was to be in terms of the Regulations and Orders of the Central Commission as per Section 79 of the Electricity Act, 2003. The Respondent No. 1 proceeded to claim the Unscheduled Interchange Charges from the Appellant in excess of the rates specified by the Central Commission and collected such charges from the Appellant and the Respondent No. 1 also began to claim handing charges for dealing with free power supplied by the Appellant to the State of Himachal Pradesh.

10. The Appellant filed Petition No. 449/MP/2014 before the Central Commission seeking refund of UI charges collected by Respondent No 2

in excess of the rates prescribed in the Regulations of the Central Commission and also sought the refund of other charges collected by Respondent No 1 from the Appellant. The Respondent No.1, in turn, filed a counter claim being Petition No. 167/MP/2015 before the Central Commission claiming that the wheeling charges and losses for using of State network for conveyance of electricity from the Bajoura substation to Nalagarh should also be held to be payable in accordance with the applicable Regulations of the State Commission in place of 6 paise/kWh as provided in the Agreement dated 03.03.1999.

11. The Central Commission passed a common order dated 10.03.2017 in Petition No. 167/MP/2015 and 449/MP/2014 holding that relationship between Appellant and HPSEBL with regard to payment of transmission charges and losses, settlement of mismatch between actual generation and scheduled energy, RLDC/SLDC operating charges shall be governed in terms of Open Access Regulations read with UI regulations as amended from time to time. Further, in Petition No 167/MP/2015, the Commission held as under:

> *"There is a dispute between the parties as to whether the transmission charges and losses determined by HPERC shall be applicable in case of the wheeling charges and losses payable by MPCL for using State Network. Since the wheeling charges and losses pertaining to the State Network fall under the jurisdiction of HPERC, we direct the parties to approach the Ld. HPERC for suitable directions in this regard. Till the matter is decided by HPERC the default transmission charges and losses as per the Open Access Regulations 2008 shall be payable. Accordingly wheeling charges and losses shall be worked out by MPCL and HPSEBL.*

12. Thereafter, by its Order dated 18.9.2017, the Central Commission decided the review petition filed by the Appellant, inter alia, holding that the transmission losses payable by the Appellant would also be as per the Open Access Regulations, 2008 as in the case of wheeling charges and losses decided in the Order dated 10.03.2017.

13. On 03.04.2017, the Executive Director (Tariff) of the State Commission gave a response to the letter dated 28.03.2017 written by Respondent No. 1 and stated that the charges and losses payable by the Appellant shall be as approved by the State Commission in the Tariff Orders; no opportunity was provided to the Appellant for being heard. Pursuance to the letter dated 03.04.2017 of the State Commission, the Respondent No. 1 began to claim charges for wheeling and for adjustment of the losses from the Appellant. Aggrieved thereby, the Appellant filed a Civil Writ Petition being No. 1078 of 2017 before the High Court of Himachal Pradesh at Shimla for quashing the letter dated 03.04.2017 issued by the Executive Director (Tariff) of the State Commission. By Order dated 12.3.2018, the High Court held that the clarification dated 03.04.2017 given by the Executive Director (Tariff) of the State Commission is not an adjudication in terms of the Order passed by the Central Commission and that the party should approach the State Commission for appropriate Orders on all the aspects. Thereafter, the Respondent No. 1 filed a petition before the State Commission on 23.3.2018 seeking adjudication for recovery of the amount from the Appellant based on the letter dated 03.04.2017 of the Executive Director (Tariff) of the State Commission.

14. In the meanwhile, the Appellant filed a Special Leave Petition before the Hon'ble Supreme Court against the Order dated 12.03.2018 passed by the Hon'ble High Court. By Order dated 18.9.2018, the Hon'ble Supreme Court disposed of the Special Leave Petition. Further, by Order

dated 30.3.2019, the State Commission has rejected the claims of the Appellant and held that the Appellant is liable to pay the wheeling charges for conveyance of power from the generating station to Nalagarh substation of POWERGRID as determined in the Tariff orders issued by the State Commission for HPSEBL. Challenging the said order, the Appellant has approached this Tribunal.

Appellant's submissions

15. Learned counsel for the Appellant submitted that pursuant to the provisions of Implementation Agreement dated 13.03.1997 between the Appellant and Government of Himachal Pradesh followed by the Agreement dated 03.03.1999 between the Appellant and erstwhile HPSEB, evacuation of power from the Appellant's project upto the Board/Regional Grid Sub-station was the responsibility of the Appellant and thereafter it was the obligation of the erstwhile HPSEB to evacuate the energy generated at the project to the mutually agreed sub-station (400 kV Nalagarh Sub-station of POWERGRID). Learned counsel submitted that clause 2.30 of the Agreement dated 03.03.1999 defines the Interconnection Point as 132 kV Bus at Bajaura Sub-station of HPSEB where the Interconnection facilities are connected and clause 2.31 of the agreement defines the Interstate Point as the physical touch point at 400 kV bus bar of 400 kV sub-station of POWERGRID at Nalagarh, where the transferable energy of the Company shall be made available to the POWERGRID by the Himachal Pradesh Board on behalf of the Appellant.

16. Learned counsel for the Appellant submitted that the Wheeling Agreement dated 03.03.1999 was executed prior to the enactment of the Electricity Act 2003 ("EA 2003"), hence, at that stage, there was no distinction between transmission and distribution assets or charges. All assets were owned by the Board for which a single charge was levied as per the agreement between the parties. Further, in order to convey the

Appellant's power outside the state, it was agreed between the parties that the Appellant would lay 132 kV dedicated line until Bajaura s/s of the Himachal Pradesh Board, and from there it is the responsibility of the board to ensure conveyance of power till POWERGRID substation, and for that purpose the Himachal Pradesh Board shall be entitled to payment of agreed charges (@ 6 paisa/kWh). Therefore, in terms of the agreement it is abundantly clear that the Appellant did not require any system intended for supply to consumers within the State.

17. The EA 2003 introduced major reforms in the sector, including the bifurcation of transmission and distribution functions, separate definitions for transmission and distribution systems, and separate charges for open access, namely transmission and wheeling charges. The Act also aimed to promote open access both intra-state and inter-state. After unbundling of the erstwhile HPSEB after 31.03.2011 into a Distribution Company HPSEBL (Respondent No. 1) and State Transmission utility, HPPTCL (Respondent No. 2), a part of above EHV assets was vested in both the Respondents. However, so far as the Appellant is concerned, there was no change in the purpose of usage, the Interconnection Point, the Interstate Point, or the System in use, except for the change in ownership of the assets. Therefore, the question which arises for consideration is whether an asset which was originally used by the Appellant for transmission of electricity (and not for supply to consumers within the State) automatically becomes a "distribution system" simply because it is retained by the Distribution Licensee. This must be assessed in the light of the fact that the asset served a purpose of transmission, not distribution, prior to unbundling and even after the EA, 2003 came into effect.

18. Learned counsel for the Appellant contended that the definition of Distribution System under Section 2(19) of the EA, 2003, states that the asset must connect to the 'point of connection to the installation of the consumer,' meaning thereby that the distribution system built and

maintained by the distribution licensee is intended to supply electricity solely to consumers within its area of supply. Although the distribution system may technically begin from a generation station or the end point of a transmission line, it must necessarily conclude at the point of connection to the consumer's installation, which denotes that the electricity was intended to be supplied to the consumers of the State. This is further emphasized by a reading of Section 42(1), which mandates that the Discom should ensure an efficient distribution system for supply to its consumers in its area of supply. Open access on the distribution system may only be used by generators for supplying electricity to the State's consumers or by consumers themselves for obtaining supply from entities other than the Discom within their area of supply. The distribution system under the EA, 2003 is not intended to provide open access to generators for transmitting electricity to inter-state points for further conveyance outside the State; this is the responsibility of the State Transmission Licensee. Additionally, Section 2(72) of EA, 2003 defines 'Transmission Lines' as those connecting generating stations to substations or to other generating stations. Therefore, it is the duty of the Transmission Licensee to transmit electricity from generating stations to substations, and a generating station can only be connected to a Discom's system when supplying power to consumers within the state. Sections 39 and 40 of the EA, 2003 specify that the Transmission Licensee must provide non-discriminatory open access to generating companies for intra-state and inter-state transmission, with the State Transmission Utility (STU), such as HPPTCL, which is responsible for planning the intra-State transmission network.

19. Thus, there is a clear distinction between the functions of a Distribution Licensee and a Transmission Licensee. It is submitted that the purpose of open access taken by the Appellant is solely for taking power from the interconnection point to the POWERGRID inter-State

point, which, under the scheme of the EA, 2003, can only be facilitated by the Transmission Licensee upon payment of transmission charges. The Distribution Licensee (HPSEBL) cannot impose charges on a generator obtaining open access for inter-State supply simply because the ownership of the asset vests with the Discom post-bifurcation. The Discom is not entitled to recover any charges unless permitted by statute, merely because it claims ownership of an asset that has always performed transmission functions from its inception until bifurcation. It is further submitted that the charges depend on the nature of the asset and its use, not the ownership.

20. If HPSEBL's argument that all the assets in the States could be owned by the Discom, and the Discom may collect wheeling charges from all users solely on the basis of ownership, regardless the nature of usage, is accepted, that would undermine the role of the STU or intra-State Transmission Licensee, and would erase the distinction between distribution and transmission functions as defined by the EA, 2003.

21. It was further submitted by the learned counsel that if a generator is made liable to pay for three open access charges i.e. Discom's charges, HPPTCL's charges, and CTU's charges, that would amount to hindering the system rather than to promote open access. The STU's role is to plan an economical and efficient transmission system, and the Appellant cannot be made liable to pay for three charges post-bifurcation merely because HPSEBL decides to retain an asset performing transmission functions. Notably, prior to the Electricity Act, 2003, when HPSEB, planning the system within the state, had proposed that the subject asset was agreed to be provided to the Appellant; the same would be rendered otiose if HPPTCL and HPSEBL, the system planners and assignees of HPSEB, are allowed to decide amongst themselves to divide asset in a manner as sought to be done. This aspect has been completely overlooked by the HPERC which is the regulator overseeing function of

the Respondents. In light of the above, it is submitted that no wheeling charge could be levied upon the Appellant.

22. Learned counsel for the Appellant contended that the HPERC, in the Impugned Order, has rightly held that the transmission charges determined in the MYT Orders passed by it are payable by the Appellant for the period until pre- bifurcation, as the asset was a transmission asset. It is important to note that distribution charges were also determined prior to the bifurcation, however, the subject asset was included within the Transmission Function.

23. However, the State Commission erred in holding that for the period from 09.12.2011 to 31.03.2012 the Appellant is liable to pay charges of 2.12 Paisa per kWh for the transmission system and 38 Paisa per kWh for the EHV system of Respondent No. 1, which is a clubbed system of 66 kV and above, merely because the same transmission assets have been divided between Respondent No. 1 and Respondent No. 2 after unbundling. Because of this finding the charges for the transmission of power from the interconnection point to the inter-State point rose from Rs. 43621 per MW/month (which is equivalent to 06 Paisa per kwh in case of the Short term Customer/Appellant) to 38 Paisa initially and thereafter as high as 67 Paisa per kwh in the year 2018-19 though the nature and use of the transmission assets has not changed. It is unfathomable that an asset consistently performing a transmission function throughout its usage is retained by the Discom, though the same is used for the same purpose as before. No reasonable explanation has been provided either for the change of the ownership of the asset from one hand to another or as to why it was earlier included as part of the Transmission System.

24. Alleging that the subject system cannot qualify as a distribution system, learned counsel for the Appellant contends that in accordance with Regulation 16(3) of the CERC (Open Access in Interstate

Transmission) Regulations, 2008, "intra-State entities" shall pay only "transmission charges" for the use of the State Network, as determined by the respective State Commission. The Appellant, admittedly, obtains inter-State open access under the relevant regulations and secures a NOC from the SLDC as per Regulation 8(2). The Appellant does not obtain separate open access from HPSEBL or HPPTCL, as Regulation 8 only requires a NOC from the SLDC. A plain reading of these regulations makes it clear that for the use of the State network, whether it is the Discom network or the transmission network, only transmission charges are payable. The SLDC, while issuing NOCs prior to the impugned order, has specified applicable transmission charges, and as regards wheeling charges it was mentioned as 'Nil'. Thereafter, in an attempt to circumvent the CERC Regulations, 2008, Respondent HPSEBL relied upon the Regulations, 2010. There is nothing in the HPERC regulations, which, in any manner, overrides or limits the application of the CERC regulations, which govern inter-State open access. Moreover, Regulation 5 of the HPERC Regulations, 2008 explicitly states that inter-State open access shall be regulated by the CERC Regulations 2008 alone. Hence, the Respondent's reliance on the HPERC 2010 regulations is misplaced.

25. Learned counsel for the Appellant submitted that the Tariff orders determining wheeling charges cannot be applied to the Appellant as Prior to tariff order for FY 2019-24, HPERC determined wheeling charges only for consumers, by taking into account the energy consumed within the State and , the Tariff Orders did not determine the wheeling charges for voltage level of 132 kV as mandated by the Regulations due to Discom not providing the requisite details.

26. The Appellant raised these issues not only before the CERC but also before the HPERC. The Respondents also argued before this Tribunal that the Appellant is estopped from raising these grounds on two counts: firstly, because the Appellant did not urge it before the High Court

when challenging the tariff orders on limited grounds; and secondly, because the tariff orders have otherwise attained finality. However, the Appellant claims that though it had raised these contentions in the counter to the petition filed by HPSEBL, the CERC kept open all issues to be decided by HPERC. The Respondent instead of filing a petition challenging the same, sought clarification from HPERC on administrative side, in which HPERC directed HPSEBL to apply tariff orders; aggrieved thereby, the Appellant approached the High Court claiming that letter of the State Commission is not an adjudication as well as tariff orders are non-est since they were issued by a single member Commission. The High Court allowed the said Writ Petition on the first ground, which was confirmed by the Supreme Court relegating the parties to approach HPERC for deciding entire issues afresh.

27. As regards the finding in the impugned order that the tariff orders have attained finality and cannot be subjected to review at this stage, it was reiterated by the learned counsel that the Appellant had no cause to challenge the tariff orders until the impugned order was passed. Prior to this, HPSEBL had never demanded the application of tariff on the Appellant. It is also significant that HPSEBL has sought a declaratory relief from the HPERC stating that the tariff orders were applicable to the Appellant. As a respondent in that petition, the Appellant could have demonstrated as to how the tariff orders are not applicable to it. Hence, for the relief sought by the Appellant, the HPERC should have examined the same, instead it brushed aside the Appellant's case on the grounds that the tariff orders were not subjected to review, despite the fact that the Appellant was not aggrieved by these orders prior to passing of the impugned order. After the impugned order, which held that the tariff orders were applicable, the Appellant without prejudice to this appeal challenged the tariff order for FY 2019-24 before this Tribunal.

28. Learned counsel for the Appellant further submitted that the HPERC (Terms and Conditions for Determination of Wheeling Tariff and Retail Supply Tariff) Regulations, 2007 at Regulation 39, and the HPERC (Terms and Conditions for Determination of Wheeling Tariff and Retail Supply Tariff) Regulations, 2011 at Regulation 37, mandate that the Discom to file for determination of wheeling tariff based on the usage forecast and the cost of the distribution system at each voltage level, so as to enable the Commission to determine voltage-wise distribution charges. As the costs and energy flow differ across voltage levels, the Appellant, being connected at 132 kV, cannot be liable for charges determined for 66 kV or 220 kV levels. However, after the issuance of the impugned order, HPERC partly corrected its methodology in the MYT Order dated 29.06.2019 for the Control Period 2019-20 to 2023-24 by taking the entire energy in the system, including energy flowing outside the State, as per the HPERC Regulations. In that order, the Commission noted that the energy handled by the system was 12,675 MUs, while energy sales were estimated at 9,101 Mus only. By applying the regulation to determine capacity-wise wheeling charges for the first time, the wheeling rates dropped by 58% to 27 Paisa/kWh. However, in the MYT Order dated 29.06.2019 for the Control Period 2019-20 to 2023-24, the HPERC did not determine wheeling charges separately for 132 kV, which the Appellant challenged before this Tribunal in Appeal No. 104/2020. This Tribunal, in its judgment dated 18.08.2022, while holding that the determination has to be voltage wise, remanded the matter to the HPERC, directing it to determine charges for 132 kV separately. Consequently, the HPERC, in its order dated 30.11.2022, determined the wheeling charge for 132 kV as Rs. .18/kWh for 2019-20.

29. Learned counsel pointed out that in previous tariff orders of the State Commission approach was to determine wheeling charges only for the consumers as is clear from its MYT Orders prior to 2014-15, which state

"Wheeling charges shall be levied on the energy drawn at the delivery point in the Distribution system." In the MYT Order for the period 2014-15 to 2018-19, the State Commission further held that, in the case of generators wheeling charges would apply only to energy injected into the system. This adjustment was made to include intra-State sale of power to consumers from generating stations, as the energy flowing outside the state was not considered.

30. Learned counsel for the Appellant submitted that despite the above pleas raised before the Commission, they were not dealt with by the Commission. Without prejudice to these submissions, even if it is held that the Appellant is liable to pay for both wheeling charges and transmission charges, the tariff orders are not applicable to the Appellant. The same argument applies to the applicability of distribution losses, as these have been determined by clubbing 66 kV and above voltage levels. Therefore, in the absence of a tariff order determining wheeling charges applicable to the Appellant, the Appellant is only liable to pay default transmission charges under CERC Regulation 16(3), without prejudice to the primary contention that the Appellant is only liable for transmission charges and not wheeling charges.

31. Learned counsel for the Appellant also submitted that until the passing of the Impugned Order, the Appellant had made payments as per the agreement at the rate of 6 paisa per kWh. Further, pursuant to the CERC final Order dated 10.03.2017, the Appellant is entitled to a refund of UI and handling charges, along with interest, which were incorrectly imposed by Respondent No. 1. After the Impugned Order, Respondent No. 1 raised a net demand of Rs. 80,69,24,569/- towards transmission and wheeling charges, after adjusting the amounts already paid under the agreement (i.e., 6 paisa per kWh) and the amount due to the Appellant for UI and handling charges in accordance with the CERC Order. Additionally, during the pendency of the appeal, in compliance with the

interim order dated 28.05.2019 and the order dated 11.12.2023, the Appellant has paid an additional sum of Rs. 40,34,62,283/, being 50% of the net demand, to Respondent No. 1.

Respondent No.1's submissions

32. Learned counsel for the Respondent No.1 submitted that the issue involved in this appeal relates to application of wheeling charges on the Appellant for the use of the 132 KV line of HPSEBL from the HPSEBL sub-station at Bajoura to the POWERGRID sub-station at Nalagarh in the State of Himachal Pradesh, in terms of tariff orders passed by the State Commission from time to time in respect of open access customers. While submitting that the dispute between the parties initially arose out of Petition No. 449/MP/2014 filed by the Appellant before CERC, learned counsel submitted that Respondent No.1-HPSEBL filed cross-Petition No. 169/MP/2015 on the applicability of the regulations as against the Agreements entered into between the parties, *vis-à-vis* the levy of unscheduled interchange charges, wheeling charges, losses, etc. The said petitions were disposed of by the Central Commission by order dated 10.03.2017. The Central Commission had, *inter-alia*, held that the relationship between the Appellant and HPSEBL in respect of payment of charges and losses, settlement of mismatch, etc. shall be governed by the Regulations, therefore, the agreement between the parties is overridden and cannot be enforced; since the Appellant uses the distribution system of HPSEBL and the transmission system of STU, the transmission and wheeling charges for the use of such a system are applicable for the open access availed by the Appellant; and as the dispute between the parties as to whether the charges determined by the State Commission in the tariff orders are applicable to the Appellant, the parties may approach the Himachal Pradesh Electricity Regulatory Commission for necessary

directions/clarification. This order has attained finality and in view of the fact that the Appellant is using the system of HPSEBL, wheeling charges are payable; and the Agreement between the parties, to the extent of levy of transmission and wheeling charges and losses cannot be relied upon or enforced. Therefore, the narrow issue which arises for consideration in this appeal is on the applicability of the charges as determined by the State Commission in various tariff orders passed from time to time. Learned counsel submitted that various contentions raised by the Appellant are misconceived.

33. Denying the submission of the Appellant that the 132 kv line of HPSEBL cannot be treated as a part of the distribution system, learned counsel submits that the Electricity Act, 2003, does not require the transmission or distribution system to be segregated at particular voltages and there is no bar for the 132 KV system to be owned and operated by a distribution licensee. By referring to the definition of a transmission line under Section 2(72) of EA, 2003, learned counsel submitted that they are the high-pressure cables and overhead lines (not being an essential part of the distribution system), therefore, a high-pressure line can also be part of the distribution system. Further, learned counsel referred to '*Distribution system*' as defined in Section 2(19) of EA, 2003 and contended that as the system of wires and associated facilities between delivery points on transmission lines and generating stations and the point of connection of the consumer, the entire system contained within is part of the distribution system. It is not restricted to specific lines, but of the entire system. A system of distribution licensee is for a particular geographical area for which the license is issued. This is as against a transmission line, where the license is for specific lines, sub-stations, and assets. Each line in a distribution system need not connect to a consumer. The distribution system as a whole is between the delivery points and the

consumer connection. The distribution system could consist of multiple lines and sub-stations in between.

34. Learned counsel further contended that in terms of Rule 4 of the Electricity Rules, 2005, the distribution system would also include all high-pressure lines primarily used for distributing electricity in the area of the distribution licensee, notwithstanding that such lines are also used incidentally for transmission of electricity for others. This applies squarely to the present case, wherein the Appellant incidentally uses the line of HPSEBL, which is otherwise for the purpose of distribution of electricity by HPSEBL in the State of Himachal Pradesh.

35. Learned Counsel asserted that the definition of wheeling as defined under Section 2 (76) of the EA, 2003 is the use of the distribution system and associated facilities of the transmission or distribution licensee. The Open Access availed by the Appellant is on the distribution system under Section 42(2) of the EA, 2003, and if the line is not part of the distribution system, no open access could have been obtained on the said line. It is not in dispute that the 132 kV line is owned by HPSEBL and the STU owns the 220 kV line used by the Appellant. The tariff of the STU is only determined for the 220 KV line and does not include the tariff for the 132 kV distribution system of HPSEBL, tariff for which is determined only for HPSEBL. Therefore, the interpretation of the Appellant that the said line is to be used for free, as it is not part of the distribution system for wheeling charges to apply is an erroneous interpretation. The line in issue was very much a part of the integrated entity prior to the unbundling of the erstwhile Electricity Board. The 132 KV line has been vested in HPSEBL in terms of the transfer scheme under Section 131 of the Electricity Act. The same cannot be indirectly challenged in the present proceedings.

36. So far as the contention of the Appellant that since the wheeling charges are computed in the tariff orders based only on the electricity consumed by the consumers of HPSEBL, the said computation is erroneous, since the said tariff orders are not applicable to the Appellant and it is only the default rate as per the CERC Regulations should apply is concerned, learned counsel while submitting that the said contention is misconceived contends that the wheeling charges are applicable for persons using the distribution system of HPSEBL and tariff orders are orders passed *in rem*, applicable to any person using the system, the charges are determined for the system of HPSEBL, for use by any person, and not *qua* the use of individual person or persons. Alleging that the challenge by the Appellant that the computation in the tariff orders is incorrect, learned counsel submits that if the energy of open-access consumers was considered in the denominator for the computation of wheeling charges, the charges would have been worked out lower. When the tariff orders are not in challenge, it is not open to the Appellant to challenge the computations made in the tariff orders in the present proceedings. Further, the Appellant had challenged the various tariff orders of the State Commission before the Hon'ble High Court of Himachal Pradesh in CWP No. 1078 of 2017 (on different grounds), which prayer was not granted by the High Court in the order dated 12.03.2018.

37. Learned counsel further contended that there is no dispute as to the jurisdiction of the State Commission to determine the wheeling charges for the use of the distribution system, however, the issue of correctness or otherwise of such determination and computation cannot be challenged by the Appellant in these proceedings. The decision of a court of competent jurisdiction is binding unless the same is set aside in appeal or review. In support of his contention, learned counsel referred

the judgement in "***Smt. Ujjam Bai vs. State of Uttar Pradesh***", (1962) SCC OnLine SC 8.

38. The Appellant is trying to confuse the issue of the alleged error in computation as against the applicability of the tariff order and the tariff orders are applicable to applicable to '*Open Access Customers*' not only consumers. The wheeling charges are also determined by the State Commission in terms of the Open Access Regulations and the Tariff Regulations. Referring to the HPERC (Short-Term Open Access) Regulations, 2010, of the State Commission. Learned counsel for the Respondent submitted that these regulations are squarely applicable to all applicants availing short-term open access from the system, even when such a system is used in conjunction with inter-state transmission. Open Access Customer can be any person using open access, including a generating company such as the Appellant. Wheeling charges are payable not only by consumers but also by Open Access Customers as per Regulation 25 of the HPERC (Short-Term Open Access) Regulations, 2010. The wheeling tariff orders of the State Commission are also specifically applicable to the Open Access Customers. In any event, in the case of open access, the person using the network is irrelevant for payment of network charges, the Wheeling Charges are payable by any person using the state network of HPSEBL. The charges cannot be different for different persons or based on the identity of the user. Any person, whether a consumer, licensee or generator has to be pay the same charges. Some other generators who are using the said system are also paying the same charges as determined by the State Commission from time to time.

39. The State Commission, in the impugned order, by taking into consideration the previous tariff orders that are applicable, has determined the wheeling charges from time to time and in case there was

no such determination, then the default rate as per the Regulations of the Central Commission has been applied. Regulatory tariff determination is always based on certain assumptions, which may evolve and improve over time and with subsequent orders. This does not however affect the applicability of the order itself or enable an Open Access Customer to avoid payment of the charges so determined. Therefore, the contention cannot be like that if the number taken in the denominator is changed, the tariff order becomes applicable. The applicability of the tariff orders remains the same, but only the computation methodology has been evolved. Tariff exercise is an ever-evolving mechanism. When the tariff order dated 29.06.2019 is applicable to the Appellant, the earlier tariff orders are also naturally applicable to the Appellant.

40. As regards the contention of the Appellant that the state commission should have determined the wheeling charges and losses for each voltage level but has only determined a common charge for 66 kV and above, which is contrary to the subsequent tariff order passed for the tariff period 2019-24, learned counsel submitted that the State Commission has determined the charges and losses voltage wise, in which voltages at 66 KV and above have been taken together. In fact, certain other State Commissions were determining a common charge for all voltage levels. Further, the Appellant had challenged the tariff order dated 29.06.2019, applicable for the tariff period 01.04.2019 to 31.03.2024, which was interfered with by this Tribunal in the judgement dated 18.08.2022 in Appeal No. 104 of 2020. The Judgement categorically records that the finding therein is limited to the period in question i.e., FY 2019-24. Therefore, the previous tariff orders that have attained finality cannot be reopened at this stage, based on the challenge to a subsequent tariff order.

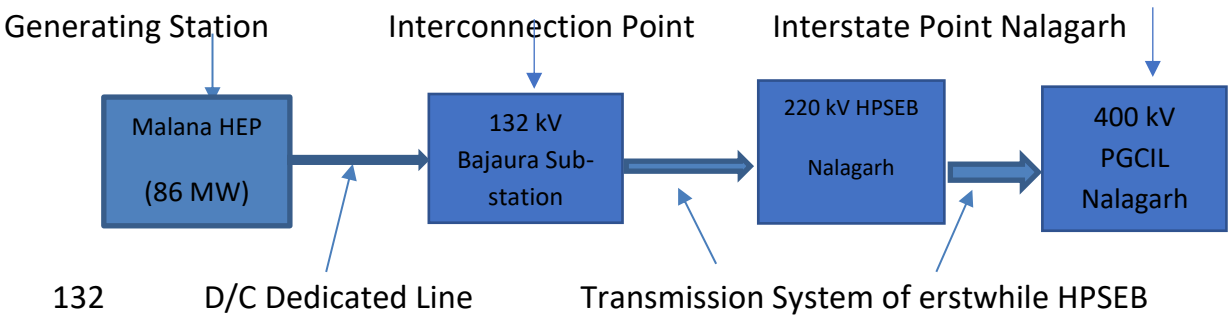
Analysis and Discussion

41. We have heard Mr B.P. Patil, learned Senior counsel for the Appellant, and Mr. Anand K. Ganesan, learned counsel for the Respondent No 1, at length. The Appellant is aggrieved by the order of the State Commission with regard to applicability of various tariff orders which determined wheeling charges for distribution system of HPSEBL, in addition to transmission charges of STU for wheeling the energy generated from its Malana Hydro Power Project from interconnecting point to inter-State transmission system i.e. Nalagarh Substation of POWERGRID, while availing inter-State Short Term Open Access post unbundling of HPSEB in 2011 into separate distribution and transmission company along with distribution of assets, while its implementation agreement dated 03.03.1999 specifies a single wheeling tariff and has contested it on several grounds, and same are deliberated below :-

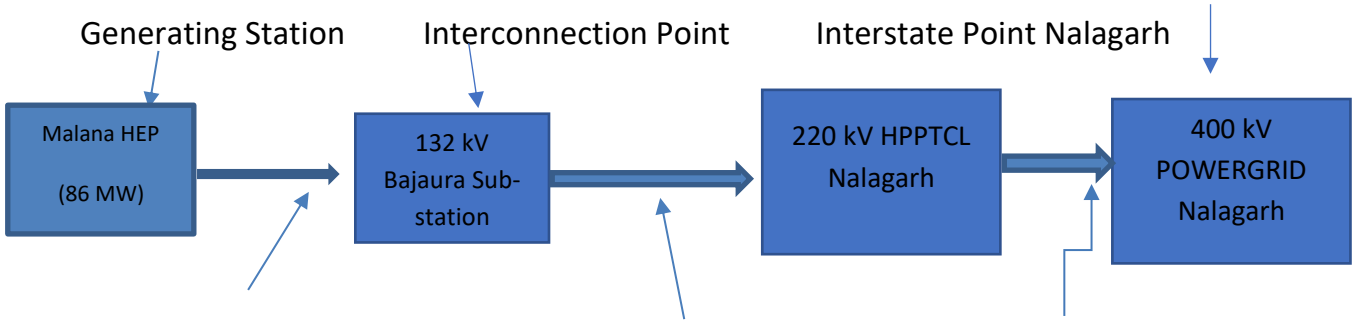
Issue No 1: 132 kV line of HPSEBL from Bajaura substation (HPSEBL) to 220 kV Nalagarh substation (HPPTCL) to be treated as a part of Distribution system of HPSEBL or not

42. The schematic diagram for wheeling of power from the generation project of the Appellant to the inter-State point at Nalagarh substation of POWERGRID is as under:

(Line Diagram Prior to Unbundling)



(Line Diagram Post Unbundling)



43. Post unbundling of HPSEB, 132 kV line from Bajaura substation to Nalagarh substation of HPPTCL is vested with distribution company i.e HPSEBL, and 220 kV line from Nalagarh Substation of HPPTCL to Nalagarh substation of POWERGRID is vested with intra-State transmission company i.e. HPPTCL, and as per impugned order, Appellant is liable to pay both wheeling charges for using distribution system of HPSEBL and intra-State transmission charges to HPPTCL, while earlier the entire system from Bajaura substation to Nalagarh substation of POWERGRID was with HPSEB and a single charge was payable.

44. Learned counsel for the Appellant has contested that since the 132 kV line from Bajaura substation to 220 KV Nalagarh of HPSEB was used by the Appellant for transmission of electricity and not for supply of power to the consumer, therefore, cannot ipso facto become distribution system, merely because it is retained by Distribution utility. It has also been contested by learned counsel for the Appellant that as per the definition of Distribution system under EA, 2003, distribution system must begin from a generation station or end point of Transmission line, and it must end at the point of connection to the installation of Consumer, and thus, the 132 kV line from Bajaura to Nalagarh 220 KV substation cannot be classified as Distribution system.

45. It is a fact that the ownership of 132 kV transmission line from Bajaura substation to 220 KV Nalagarh substation vested with HPSEBL subsequent to unbundling of HPSEB and being operated by HPSEBL as part of its Distribution System, in terms of the Transfer scheme under section 131 of Electricity Act 2003 and same is not open to challenge under present proceedings. As such, under the Electricity Act 2003, there is no demarcation of voltage wise assets, which can be classified as Distribution system or Transmission system; definition of 'Distribution system' and 'Distribution licensee' in the Electricity Act 2003, is reproduced below:

> *"Section 2 (17) "distribution licensee" means a licensee authorised to operate and maintain a distribution system for supplying electricity to the consumers in his area of supply:*
>
> *Section 2 (19) "distribution system" means the system of wires and associated facilities between the delivery points on the transmission lines or the generating station connection and the point of connection to the installation of the consumers;*"

46. In a distribution system, there are various intermediary elements between generating station/ transmission lines and interconnection point of consumers, which are essential part of distribution system for supplying electricity to the consumers in its area of supply. In our view, each line in a distribution system need not connect to a consumer, and distribution system as a whole is between the delivery points and the consumer connection. By the definition of Distribution licensee, it is evident that it is authorised to operate and maintain a distribution system in its area of supply, which in the present case involves the 132 kV line from Bajaura substation to 220 kV Nalagarh substation also. A distribution system of a Distribution licensee is for a particular geographical area for which license is issued, unlike transmission system, where license is for specific lines, substation etc.

47. In view of the above, it is difficult to accept the contention of the Appellant that only the system of wires originating from generating station/ transmission lines terminating into point of connection to the installation of consumer can only be quantified as distribution system; as it would mean that 132 KV line from Bajaura to 220 KV Nalagarh substation and all other such lines, which are not terminating in interconnection point at the installation of consumers, though essential for supplying power to consumers and maintained by Distribution Licensee, will not be part of Distribution system. Accepting this contention would mean that number of lines needs to be excluded from the Distribution system of Distribution Licensee and how and who will service those lines and who will maintain those lines is unanswered. Even accepting this contention in the case of Appellant alone that since 132 KV line from Bajaura to 220 KV Nalagarh substation is only used for wheeling its power to inter-State point of connection and not for serving any consumer of Appellant and therefore it can't be treated as Distribution system, would mean that subject line would change its status from being part of Distribution system when serving consumer within the State and not to be part of distribution system when wheeling power under Open access for generating company, whose consumers/ customers are not located within the area of supply of Distribution Licensee, which, in our opinion, is erroneous. We are, therefore, of the view that 132 kV line from Bajaura substation to 220 kV Nalagarh substation is a part of Distribution system of HPSEBL for all purposes.

48. Further, it is a fact that generating station of the Appellant is connected to the 132kV Bajaura Substation of HPSEBL and 132 kV line from Bajaura substation to 220 KV Nalagarh substation, ownership of which vests with HPSEBL post unbundling of HPSEB, are essential for evacuation and Wheeling of power from the Malana Hydro Power Project

of the Appellant and in fact, inter-State Short term open access is effected from the Distribution system of HPSEBL. Thus in our view, HPSEBL cannot be tasked to wheel power from Appellant's Malana Hydro Power Project free of charge and therefore HPSEBL is entitled to get charges for the same in line with the Regulations.

Issue No 2: Applicability of wheeling charges for wheeling of power from Generation project of Appellant in addition to intra-State Transmission charges or only intra-State transmission charges

49. Learned counsel for the Appellant has contended that as per Regulation 16(3) of the CERC [Open access in inter-state Transmission] Regulations, 2008, the Appellant is liable to pay only transmission charges for use of the State network as determined by the respective State Commission in addition to the inter-State charges; the Appellant has obtained inter-State open access under the aforesaid Regulations and obtained NOC from SLDC in term of Regulation 8(2) and has not obtained separate open access from HPSEBL or HPPTCL. As per above Regulations, for usage of State network (whether Discom's network or transmission network), only transmission charges are payable. The SLDC, while issuing NOC till the impugned order, has mentioned the applicable transmission charges, and wheeling charges were mentioned as 'Nil'. It has been further contended that the reliance placed by the Respondent HPSEBL upon the HPERC [Short Term open access] Regulations, 2010 is misplaced as there is nothing in the HPERC Regulations which, in any manner, override or limit application of the CERC [Open access in inter-state Transmission] Regulation 2008, and further the detailed procedure issued under Regulation 5 of the HPERC Regulations, 2010, provides that the inter-state open access shall be regulated by the CERC [open access in inter-state Transmission] Regulations, 2008 alone.

50. To deliberate this issue, relevant provisions from CERC [Open access in inter-state Transmission] Regulation 2008 are reproduced below:

"Regulation 2 (1)(l)

(l) "open access customer" means a person who has availed or intends to avail of open access under these regulations and includes a short-term transmission customer as defined in any other regulations, specified by the Commission or a generating company (including captive generating plant) or a licensee or a consumer permitted by the State Commission to receive supply of electricity from a person other than distribution licensee of his area of supply, or a State Government entity authorized to sell or purchase electricity,"

"Regulation 2 (1)(p)

(p) "State network" means network owned by the State Transmission Utility, distribution licensee or any other person granted licence by the State Commission to construct, operate and maintain the transmission system;"

"Regulation 8 (1)

Concurrence Of State Load Despatch Centre For Bilateral And Collective Transactions

8.(1) Wherever the proposed bilateral transaction has a State utility or an intra-State entity as a buyer or a seller, concurrence of the State Load Despatch Centre shall be obtained in advance and submitted along with the application to the nodal agency. The concurrence of the State Load Despatch Centre shall be in such form as may be provided in the detailed procedure.

Transmission Charges

"Regulation 16

(1) In case of bilateral transactions, for use of the inter-State transmission system, the transmission charges at the rate specified hereunder shall be payable by the applicant for the energy approved for transmission at the point(s) of injection:

Type of Transaction	*Transmission charges (Total) (Rs./MWh)*
(a) Bilateral, intra-regional	*30*
(b) Bilateral, between adjacent regions	*60*
(c) Bilateral, wheeling through one or more intervening regions	*90*

…….

(3) The intra-State entities shall additionally pay transmission charges for use of the State network as determined by the respective State Commission:

Provided that in case the State Commission has not determined the transmission charges, the same shall not be a ground for denial of open access and charges for use of respective State network shall be payable for the energy approved at the rate of Rs.30/MWh"

51. There is no dispute that the Appellant has availed inter–State short term Open Access and is an "open Access Customer" as per Regulation 1(l) of CERC **[**Open access inter-state Transmission] Regulations, 2008, (**"CERC OA regulations 2008"**). NOC from the concerned SLDC is mandated under Regulation 8 for intra-State utility availing inter-State open access and it is immaterial whether such an entity intends to utilize only State's Transmission system or only Distribution system or both. As per Regulation 16(3) of CERC OA Regulations 2008, in addition to inter-State Transmission charges, the intra-State utility is required to additionally pay transmission charges for the use of State Network as determined by the State Commission. Therefore, the determination of

charges for use of State Network is to be decided by the respective State Commission, and when such charges are not determined by them, then specified charges as notified in CERC open access Regulations, from time to time, shall be applicable. In our view, it is of no consequence whether SLDC has mentioned only transmission charges and mentioned wheeling charges as NIL while granting NOC, as same would be governed by applicable Regulation. Learned counsel for the Appellant emphasizing on the word "transmission Charges" has disputed the applicability of wheeling charges so determined by the State commission through various tariff order from time to time, for the use of distribution system.

52. In this context, let's look at the concerned Regulation notified by State commission, namely HPERC [Short Term open access] Regulations, 2010 ("**HPERC OA Regulation 2010**"), and the relevant clauses of which are reproduced below **:**

REGULATIONS CHAPTER-1-PRELIMINARY

(3) These regulations shall apply to the applications made for grant of short term open access for energy transfer schedules for use of intra-State transmission system and/or distribution system of the licensees in the State of Himachal Pradesh, including when such system is used in conjunction with the inter-State transmission system.

Regulation 2(15)

(15) "open access customer means a person, who has availed or intend to avail of open access under these regulations, and includes a short-term open access customer or a generating company (including the captive generating plant) or a licensee of a consumer permitted by the Commission to receive supply of electricity from a person other than distribution licensee of his area of supply, or State

Government entity authorised to sell or purchase electricity;

Regulation 25

Charges for open access in distribution*- The open access customers shall pay the wheeling charges determined, from time to time, under the Himachal Pradesh Electricity Regulatory Commission (Terms and Conditions for Determination of Wheeling Tariff and Retail Supply Tariff) Regulations, 2007, for the use of the distribution system.*

53. The HPERC OA Regulations 2010 are applicable for grant of short-term open access for use of intra-State Transmission and/or distribution system including when such system is used in conjunction with inter-State Transmission system. These Regulations also envisage situations when either the Transmission system or Distribution system or both Transmission and Distribution system of the State utilities gets utilized. Therefore, the Appellant is also covered as per the provisions of HPERC OA Regulations 2010 as far as use of intra-State transmission and Distribution system is concerned, and we do not agree with the contention of the Appellant that it is covered only under CERC OA Regulations 2008.

54. Subsequent to the enactment of Electricity Act 2003 and framing of Regulations both by Central Commission and State Commission**,** it is a settled law that a regulation being in the nature of subordinate legislation can override the existing contracts including the power purchase agreement ("***PTC India Ltd v Central Electricity Regulatory Commission ((2010) 4 SCC 603).***

55. As deliberated in the previous paragraphs, the Appellant is utilising both Distribution System and Transmission system of State Utilities, and when HPERC regulations have provided for applicability of wheeling charges on the open access customers for the use of the distribution system, we find no justification in the contention of the Appellant that it is

liable to pay only intra-State transmission charges for the use of State Network.

56. In view of above deliberation, we hold that the Appellant is liable to pay wheeling charges in addition to intra- State Transmission charges for the use of State Network as per applicable Regulations.

Issue No 3: Applicability of various tariff orders of State Commission for Wheeling of Power or Default transmission Charges as per CERC OA regulations 2008, as amended from time to time.

57. Learned counsel for the Appellant has contested the Applicability of Tariff orders of State Commission for wheeling of power on twin account, even if it is liable to pay wheeling charges; firstly, prior to tariff order for FY 19-24, the State Commission has determined wheeling charges only for the consumers, since energy consumed within the State only was considered and the energy flowing outside the State was excluded, and secondly, Wheeling Charges were not determined separately for 132 kV. Basing on the observation of the State Commission that earlier tariff orders have attained finality, learned counsel for the Appellant contended that the Appellant had no cause to challenge the applicability of earlier Tariff Orders as it was paying charges in terms of the Agreement dated 03.03.1999 and as per order of the High Court in Writ Petition, as also affirmed by the Supreme Court, wherein the parties were directed to approach the State Commission for deciding entire issue afresh.

58. Per contra, learned counsel for the Respondent has contended that the Appellant has basically challenged the computation in the tariff orders, which is impermissible in the present proceedings; as challenge to various Tariff Orders by the Appellant, though on different grounds, was not allowed by the High Court in its order dated 12.03.2018, and as such, the Tariff orders are not in challenge, therefore, it is not open to the Appellant

to challenge the computation made in tariff orders by the Commission in the present proceedings.

59. Let's look at the chronology of major events with regard to wheeling charges determined by the State Commission:

- **05.07.2001**: COD of the Hydro Project – Appellant giving 12 % free power to the State and for evacuation of balance power outside the State, is utilizing HPSEB network availing inter-State short term open access, on payment of charges agreed in the Agreement dated 03.03.1999.
- **2010**: unbundling of HPSEB and State system being used by Appellant came to vest with Respondent No 1, HPSEBL – the distribution Company and Respondent No2, HPPTCL – the intra State transmission utility.
- **01.11.2014**: Appellant filed Petition No. 449/MP/2014 before CERC for applicability of CERC regulations for UI charges etc., instead of Agreement and sought refund of extra charges so collected by Respondent No. 1 from the Appellant.
- **27.04.2015** : Respondent No. 1 filed counter claim vide Petition No 167/MP/2015 for computing of wheeling charges and losses payable by the Appellant in terms of the Tariff orders/ARR's passed by the HPERC.
- **10.03.2017**: CERC passed common order in above petition observing that relationship between the Appellant and HPSEBL with regard to payment of transmission charges and losses, settlement of mismatch between the actual generation and scheduled energy, RLDC/SLDC Operating Charges etc. shall be governed in terms of the Open Access Regulations read with the UI Regulations, as amended from time to time. In light of the principle laid down by the Hon'ble Supreme Court, regulated entities are required to align their existing and future agreements accordingly.

In Petition No. 449/MP/2014 filed by the Appellant, Respondent was directed to return the excess UI Charges along with interest. The dispute in respect of the wheeling charges and losses was referred to the State Commission.

- **11.04.2017** : Based on the letter dated 03.04.2017 from ED (Tariff) HPERC about the applicability of transmission/wheeling Charges determined by HPERC from time to time for use of State System HPSEBL, Respondent No 1 worked out the net amount payable by the Appellant after deduction of handling charges at Rs. 55,73,25,952/- and directed the Appellant to release the payment.

- **17.05.2017**: Appellant filed Civil Writ Petition No. 1078 of 2017 before the High Court of Himachal Pradesh praying for quashing of letter dated 03.04.2017 issued by Executive Director Tariff, HPERC to Respondent No 1 and consequent letter dated 11.04.2017 issued by Respondent No 1 to Appellant. Appellant also sought for quashing the tariff orders issued by HPERC, relied upon by Respondent No. 1 to raise demand of wheeling charges on the ground that the said Tariff Order has been issued by single member i.e. Chairman HPERC.
- **12.03.2018**: The High Court of Himachal Pradesh passed final order holding that the clarification dated 03.04.2017 given Executive Director Tariff, HPERC is not an adjudication in terms of the order of the CERC. Regarding the issue of the legality of the Tariff Orders passed the HPERC without quorum, raised by the Appellant, Court left all questions open to be decided at appropriate stage by appropriate forum/ courts. It directed Appellant and Respondent to approach the State Commission.
- **23.03.2018:** HPSEBL filed petition before HPERC praying for recovery of amount based on letter dated 03.04.2017.

- **12.04.2018** : Appellant filed SLP before the Hon'ble Supreme Court against the order of the High Court of Himachal Pradesh on the ground that the High Court should have dealt with all issues related to the Quorum and Constitution of the HPERC. The Hon'ble Supreme Court ordered Stay of the Order of the High Court dated 12.03.2018.
- **18.09.2018** : The Hon'ble Supreme Court disposed the SLP stating that the Order of HPERC dated 03.04.2017 signed singly is non-est and the entire issue would be decided afresh by the State Electricity Regulatory Commission. The Supreme Court left all contentions of the parties open before the State Commission.
- **30.03.2019** : HPERC passed the impugned order in petition filed by HPSEBL and held that the tariff orders passed by HPERC during the period from 6th January 2006 cannot be held invalid merely on the ground that tariff orders were issued by single member commission and worked out applicability of following wheeling charges based on various Tariff Orders of State Commission or otherwise.
- ***CHARGES PAYABLE AS PER THE COMMISSION'S CONCLUSION***

Sr. NO.	***Period***	***Applicable CERC/HPERC Regulation***	***Applicable Rate***	
			Transmission System of the erstwhile HPSEB / HPPTCL	***HPSECL (DISCOM) EHV System***
1.	*01.04.2008 to 25.09.2008*	*CERC Regulations dated 25.01.2008.*	*Default charges as per CERC regulations shall be applicable.*	
2.	*26.09.2008 to 31.03.2009*	*HPERC orders dated 30.05.2008 and 05.09.2008*	*Rs. 43621/MW/ month*	*Not applicable*

3.	*01.04.2009 to 25.11.2009*	*CERC Regulations dated 25.01.2008.*	*Default charges as per CERC regulations shall be applicable*	
4.	*26.11.2009 to 31.03.2010*	*HPERC orders dated 24.08.2009 and 25.11.2009*	*Rs.43358.92/MW/month*	*Not applicable*
5.	*01.04.2010 to 24.08.2010*	*CERC Regulations dated 25.01.2008.*	*Default charges as per CERC regulations shall be applicable.*	
6.	*25.08.2010 to 31.03.2011*	*HPERC orders dated 10.06.2010 and 19.08.2010*	*Rs. 64967.43/MW/ month*	*Not applicable*
7.	*01.04.2011 to 08.12.2011*	*CERC Regulations dated 25.01.2008.*	*Default charges as per CERC regulations shall be applicable.*	
8.	*09.12.2011 to 31.03.2012*	*HPERC orders dated 14.07.2011, 19.07.2011 and 01.12.2011*	*2.12 Paisa/kWh*	*38 Paisa/ kWh*
9.	*1.4.2012 to 26.06.2012*	*CERC Regulations dated 25.01.2008*	*Default charges as per CERC regulations shall be applicable.*	
10.	*27.06.2012 to 31.03.2013*	*HPERC orders dated 14.07.2011, 24.04.2012 and 26.06.2012*	*2.15 Paisa/kWh*	*47 Paisa/kWh*
11.	*01.04.2013 to 31.03.2014*	*HPERC orders dated 14.07.2011, 27.04.2013 and 29.05.2013*	*2 Paisa/kWh*	*44 Paisa/kWh*
12.	*01.04.2014 to 31.03.2015*	*HPERC orders dated 10.06.2014 and 12.06.2014*	*2 Paisa/kWh*	*46 Paisa/kWh*

For the sake of clarity, we would like to mention that such charges for the financial years 2015-16 to 2018-19 have also been determined under the respective Tariff Orders and the same shall also be applicable in the instant case ".

23.04.2019: Present Appeal (No.160 by 2019) was filed by the Appellant assailing the impugned order**.**

2020 : Appellant approached this Tribunal vide Appeal No. 104 of 2020 assailing the MYT order dated 29.06.2019 passed by HPERC for determination of wheeling charges for the Control period FY 2019-20 to FY 2023-24 on the ground that it has determined single wheeling charge for all open access consumers connected at 66 kV level and above.

18.08.2022 : This Tribunal vide its order in Appeal No. 104 of 2020 set aside the HPERC MYT order dated 29.06.2019 to the extent of its applicability to the Appellant in respect of Wheeling charges and directed the State Commission to calculate voltage wise wheeling charges for voltage level 66 kV and above.

30.11.2022 : HPERC passed consequential order and determined voltage wise wheeling charges separately for 66 kV, 132 kV and 220 kv.

60. In the impugned order, as detailed above, HPERC has given details of the applicable HPERC tariff orders passed in terms of various Wheeling and Retail supply Regulations of HPERC, for different period since 01.04.2008, and in the event of non-determination of wheeling charges for a particular period, then default charges as per CERC Regulations have been made applicable. In the Himachal Pradesh Electricity Regulatory Commission (Terms and Conditions for Determination of wheeling Tariff and retail Supply Tariff) Regulations

2007 (in short referred to as (**"HPERC Wheeling Regulations 2007"**), and Himachal Pradesh Electricity Regulatory Commission (Terms and Conditions for Determination of wheeling Tariff and retail Supply Tariff) Regulations 2011 (" **HPERC Wheeling Regulations 2011")**, based on which various MYT tariff orders have been passed, has defined 'wheeling' as under :

> *"Wheeling" means the operation whereby the distribution system and associated facilities of a distribution licensee are used by another person for the conveyance of electricity on payment of charges to be determined under section 62."*

61. As held above, part of the State System being used by the Appellant for wheeling its power up to inter-State point of interconnection, which is a part of Distribution System of the Respondent HPSEBL, and therefore, the Appellant is liable to make payment for the wheeling charges so determined as per extent Regulations.

62. We note that no efforts were made both by the Appellant and the Respondent with regard to aligning their contracts/agreement in respect of Regulations till the Appellant has filed petition before Central Commission on 01.11.2014 and counter petition by Respondent on 27.04.2015 for payment of various charges as per Regulations instead of Agreement. It has been rightly held by the Central Commission in its order dated 10.03.2017 that both the Appellant and HPSEBL should have aligned their contracts with the provisions of open Access Regulations 2008 and UI regulations 2009 and the parties cannot claim waiver on the ground of having acted on the basis of agreements which are inconsistent with the statutory Regulations.

63. With regard to the observation in the impugned order that various tariff orders of HPERC has attained finality, we do not find merit in the submission of the Appellant that it had no cause to challenge the

applicability of tariff orders on other grounds, as it took the stand that applicability had to be decided by HPERC subsequent to High court order in Writ Petition. Before this Tribunal also, Appellant chose to challenge only HPERC MYT order dated 29.06.2019 applicable for control period FY 2019-24, which was re-determined by the State Commission vide its consequential order dated 30.11.2022, subsequent to remand by this Tribunal vide order dated 18.08.2022.

64. In the Writ Petition before High Court, the Appellant chose to challenge only those tariff orders which were used in demand notice, on the ground that it has been passed by a Single Member of the HPERC. We are not required to go into the issue of validity or otherwise of such tariff orders of HPERC, which are passed by a Single member and upheld by HPERC in the impugned order, as same has not been pressed for adjudication by the Appellant in the present appeal. We can't thus ignore the fact that till date, except the Tariff order for FY 2019-24, the Appellant chose not to challenge any previous order on these twin account of voltage wise determination of wheeling charges and consideration of entire energy handled by Distribution System, in any forum.

65. We do not find any infirmity in the views of the State Commission as well as in the contention of the Respondent that earlier tariff orders have attained finality and correctness or otherwise of determination and Computation of tariff cannot be challenged in the present proceedings; we place reliance on the Supreme Court judgement in "***Smt Ujjam Bai vs State of Uttar Pradesh",*** (1962) SCC OnLine SC 8 which *inter-alia* held as under:

> *"19…… The characteristic attribute of a judicial act or decision is that it binds, whether it be right or wrong. An error of law or fact committed by a judicial or quasi-judicial body cannot, in general, be impeached otherwise than on appeal unless the erroneous determination relates to a matter on which the jurisdiction of that body depends. These principles govern not only the findings of inferior*

courts stricto sensu but also the findings of administrative bodies which are held to be acting in a judicial capacity. Such bodies are deemed to have been invested with power to err within the limits of their jurisdiction; and provided that they keep within those limits, their decisions must be accepted as valid unless set aside on appeal. ……"

66. In view of the above discussion and deliberation, we do not find any infirmity in the order of the State Commission dated 30.03.2019, impugned in this Appeal, and the same is hereby upheld. The Appeal is, accordingly, dismissed and all associated IAs are also disposed of.

Pronounced in open court on this 21st day of November, 2024.

(Seema Gupta)	**(Justice Ramesh Ranganathan)**
Technical Member (Electricity)	**Chairperson**

REPORTABLE / ~~NON-REPORTABLE~~

ts/dk/ag